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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

IN RE: TOYOTA MOTOR CORP. UNINTENDED ACCELERATION MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION

This document relates to:

ALL ECONOMIC LOSS CASES

Case No.: 8:10ML2151 JVS (FMOx)

TOYOTA'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO COMPEL ARBITRATION

Date: February 27, 2012
Time: 1:30 p.m.
Location: Court Room 10C
Judicial Officer: Hon. James V. Selna

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I. INTRODUCTION

Tens of millions of consumers in the United States have purchased a Toyota, Lexus, or Scion vehicle at issue in this litigation. A small subset of those consumers filed lawsuits against Toyota Motor Corporation ("TMC") and Toyota Motor Sales U.S.A., Inc. ("TMS") (collectively "Toyota"), which have been consolidated into multi-district litigation before this Court ("MDL"). Many of those consumers, when they bought their particular vehicle, signed a purchase agreement, lease, or retail installment contract ("Purchase Agreement") in which they agreed to arbitrate any disputes that arise out of or relate to the purchase of their vehicle. In light of this Court's recent decision to initiate proceedings in connection with a proposed bellwether class action trial to be held in 2013, it is now appropriate to refer to arbitration all of the proposed class representatives for the bellwether case that have executed a Purchase Agreement that contains an arbitration provision.

At the outset of this litigation, Toyota reasonably believed it could not invoke these arbitration agreements because: (1) plaintiffs asserted that California law alone should apply to a nationwide class of consumers; and (2) courts in California and in this Circuit frequently held arbitration agreements to be unconscionable and unenforceable when they contained provisions through which consumers waived their right to participate in class litigation or class arbitration. *E.g.*, *Discover Bank v. Superior Court,* 36 Cal.4th 148, 162-63 (2005).

Now that this Court has scheduled the proposed bellwether class action litigation and trial, two significant things have changed: (1) on June 8, 2011, this Court denied plaintiffs' request to apply California law exclusively to a nationwide class of consumers [Dkt. 1478]; and (2) on April 27, 2011, not long before this Court finally ruled on the choice of law dispute in this MDL, the United States Supreme Court decided *AT&T Mobility LLC v. Concepcion,* 131 S.Ct. 1740 (2011), which overturned established California and Ninth Circuit law by holding that arbitration agreements containing class action waivers are enforceable.

Concepcion, 131 S.Ct. at 1750. The import of the Supreme Court's decision is clear: Plaintiffs who signed arbitration provisions must now submit their claims to arbitration on an individual basis in accordance with the plain terms of their written Purchase Agreements.

Although Toyota is not a signatory to the Purchase Agreements that contain these arbitration provisions, Toyota is entitled under established law to compel arbitration under the doctrine of equitable estoppel because plaintiffs' claims against Toyota "make reference to" and "presume the existence of" the Purchase Agreements that contain the arbitration provisions. *E.g.*, *Amisil Holdings Ltd. v. Clarium Capital Mgmt.,* 622 F.Supp.2d 825, 840 (N.D. Cal. 2007). Indeed, Plaintiffs repeatedly contend that they failed to receive the "benefit of the bargain" in purchasing their vehicles, which is essentially a form of breach of contract claim. *E.g.*, Second Amended Master Consolidated Complaint ("SAMCC") [Dkt. 580], at ¶¶ 461, 2142. Accordingly, Toyota is moving to compel arbitration on an individual basis with those representatives for the proposed bellwether class that signed a Purchase Agreement that contains an arbitration clause.

II. FACTUAL BACKGROUND

Like the vast majority of individual new car consumers in the United States, the class representatives identified in the SAMCC purchased their respective vehicles from a local dealership. In each case, the class representatives signed a Purchase Agreement at the dealership, many of which contain arbitration agreements requiring them to arbitrate any disputes that arise out of or relate to their purchase of a vehicle.

Plaintiffs' Bellwether Class Identification [Dkt. 1797] identifies three alternative consumer classes for each of three states: California, New York, and Florida. In doing so, Plaintiffs identified 25 proposed class representatives. [Dkt. 1797]. An amended class action complaint filed by Carol Danziger adds two new plaintiffs to the mix. *Danziger* Am. Compl. ¶¶ 34-41. Altogether, there are 27 named plaintiffs in the SAMCC and Danziger complaints that might serve as class

representatives for the putative bellwether class.

Among the proposed class representatives for the bellwether case, 22 out of 27 signed a Purchase Agreement that contains an arbitration clause,[1] and Toyota is moving to compel arbitration against 21 of them ("Plaintiffs").[2] Each of the Plaintiffs signed a Purchase Agreement containing an arbitration clause.[3] Declaration of Cari Dawson ("Dawson Decl."), Ex. A. For example, Plaintiff Rocco Doino signed a Purchase Agreement that contains the following agreement:

"AGREEMENT TO ARBITRATE ANY CLAIMS AND TO WAIVE THE RIGHT TO CLASS ACTIONS, READ THE FOLLOWING PROVISION CAREFULLY, LIMITS YOUR RIGHTS, INCLUDING YOUR RIGHT TO BRING AN ACTION IN COURT, HAVE A JURY TRAIL OR MAINTAIN A CLASS ACTION," The parties to this agreement agree to arbitrate any claim, dispute or controversy, including all statutory claims and any state or federal claims that may arise out or relating to the purchase or lease identified in the Motor Vehicle Retail Order and the financing thereof. By agreeing to arbitration, the parties understand and agree that they are waiving their rights to maintain other available resolution processes such as a court action or administrative proceedings to settle their dispute. Used Car Lemon Law and Truth-in-Lending claims are examples of the various types of claims subject to arbitration under this agreement. The parties also agree to waive any right to pursue any such claims including statutory state or federal claims as a class action. There are no limitations on the type of claims that must be arbitrated, except for New Car Lemon Law and Magnuson-Moss Warranty Act claims which are excluded from arbitration under this agreement. The arbitration shall be conducted in accordance with the Rules of the American Arbitration Association before a single arbitrator. The costs included in the arbitration process shall be shared as provided by the Association's rules. The Arbitration shall take place in New York at the address of the dealership listed on the Retail Order form. The decision of the arbitrator shall be binding upon the parties. Any further relief sought by either party will be subject to the decision of the arbitrator. THIS ARBITRATION PROVISION LIMITS YOUR RIGHTS, INCLUDING YOUR RIGHT TO MAINTAIN A COURT ACTION AND HAVE A JURY TRIAL. PLEASE READ IT CAREFULLY PRIOR TO SIGNING.

Accepted by: *Signed* _____ *Signed* _____
Dealer or Authorized Representative Date Customer Date

Dawson Decl., Ex. N. Like Mr. Doino's agreement, all of the arbitration clauses cover a broad scope of claims, including all of the claims asserted in the SAMCC. Other aspects of each provision are discussed herein as necessary to the analysis.

III. GOVERNING LEGAL STANDARD

The Federal Arbitration Act ("FAA") "declare[s] a national policy favoring arbitration." *Preston v. Ferrer*, 552 U.S. 346, 353 (2008) (emphasis added). In doing so, the FAA expresses Congress' intent to reverse "centuries of judicial hostility to

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[1] One of the California representatives, John Moscicki, signed an arbitration clause stating that the right to arbitration is waived if either party files an appearance in court before filing an arbitration demand. Dawson Decl., Ex. Z. In light of this specific provision, Toyota is not moving to compel arbitration with Mr. Moscicki.

[2] This Court has ordered the parties to focus on the bellwether class action trial, but Toyota does not waive and hereby expressly reserves the right to compel arbitration against other named Plaintiffs in the SAMCC and other underlying complaints.

[3] For clarity, Toyota is moving to compel arbitration against the following proposed class representatives: Kathleen Atwater, Dale Baldisserri, Charmayne Bennett, Joseph Hauter, Dr. Aly Mahmoud, Lucinda Mahmoud, Peggie Perkin, Janette Seymour, Tully Seymour, Linda Tang, Carol Danziger, Ziva Goldstein, Tom Gudmundson, Linda Savoy, Elizabeth Van Zyl, Rocco Doino, Bridie Doino, John Laidlaw, Mary Laidlaw, Ada Morales, and Charles Henry.

arbitration agreements" and to place them "upon the same footing as other contracts." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974) (quoting H.R. Rep. No. 68-96, at 1, 2 (1st Sess. 1924)). Thus, the FAA requires courts to "rigorously enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985). Indeed, "the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Id.* at 218.

The FAA applies to any written arbitration agreement contained in a contract "evidencing a transaction involving commerce." 9 U.S.C.A. § 2. The Supreme Court has expansively construed the phrase "involving commerce," interpreting it as extending the FAA's reach to the full limit of Congress' Commerce Clause power. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268 (1995). Accordingly, there is no question that the FAA applies to the arbitration agreements at issue here. Indeed, 17 out of 21 agreements explicitly provide that claims will be resolved in accordance with the FAA.[4] Chart of Arbitration Provisions, Dawson Decl., Ex. A; Purchase Agreements, Dawson Decl., Exs. C-CC.

This strong federal policy favoring arbitration for dispute resolution "requires a liberal reading of arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 n.27 (1983). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 24-25; *see also Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1044 (9th Cir. 2009)). Accordingly, "[f]ederal courts are required to rigorously enforce an agreement to arbitrate," *Estrella v. Freedom Fin.*, No. C 09-031565 SI, 2011 WL 2633643, *3 (N.D. Cal. July 5, 2011) (citing *Hall Street Assoc., LLC v.*

[4] For the convenience of the Court, Toyota has attached a chart outlining core aspects of the arbitration provisions for each of the Plaintiffs. *See* "Chart of Arbitration Provisions," Dawson Decl., Ex. A.

Mattel, Inc., 552 U.S. 576, 581 (2008)), and must do so "according to [the agreement's] terms." *Concepcion,* 131 S.Ct. at 1748.

Finally, the FAA provides that a court must stay judicial proceedings, pending the outcome of the arbitration itself. 9 U.S.C.A. § 3. In light of these principles, this Court should compel Plaintiffs to arbitrate their claims against Toyota and stay this action as to those Plaintiffs pending the outcome of such arbitrations. *See id.*

IV. ARGUMENT AND CITATIONS OF AUTHORITY

A. This Court Should Refer Plaintiffs To Arbitration Pending Identification Of Any Non-Arbitrable Claims

Pursuant to the plain and unambiguous language of all 21 of the Purchase Agreements, this Court should refer Plaintiffs to arbitration pending the identification by the arbitrators of any non-arbitrable claims. As evidenced by the arbitration agreements, the Plaintiffs here agreed that the threshold issue of arbitrability would be decided by an arbitrator selected pursuant to the agreement—not by this Court. Chart of Arbitration Provisions, Dawson Decl., Ex. A. Under established law, based on the unambiguous terms of the arbitration agreements alone, this Court should therefore refer Plaintiffs' claims to arbitration for a determination regarding arbitrability.

In certain circumstances, courts assume that the parties to a contract intend for a court to decide such threshold matters as "whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy." *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444, 452 (2003). However, that assumption is rebutted where, as here, "the parties clearly and unmistakably provide otherwise" and agree to let the arbitrator decide such issues. *AT&T Techs., Inc. v. Commc'n Workers of Am.,* 475 U.S. 643, 649 (1986); *First Options of Chi., Inc. v. Kaplan,* 514 U.S. 938, 943 (1995); *Anderson v. Pitney Bowes, Inc.,* No. C 04-4808 SBA, 2005 WL 1048700, *2 (N.D. Cal. May 4, 2005) ("[I]f the parties 'clearly and unmistakably' empowered an arbitrator to determine arbitrability, the [c]ourt must compel arbitration of the gateway issues as well.").

Accordingly, "the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter." *First Options of Chi., Inc.,* 514 U.S. at 943; *Anderson,* 2005 WL 1048700 at *2 ("Parties are free . . . to contract around th[e] default rule [that courts decide the question of arbitrability] by assigning the determination of arbitrability to an arbitrator." (internal citations omitted)). Where the parties have agreed to vest the arbitrator with authority to decide such threshold issues, "the courts will be divested of their authority and an arbitrator will decide in the first instance whether a dispute is arbitrable." *United Broth. of Carpenters & Joiners of Am., Local No. 1780 v. Desert Palace, Inc.,* 94 F.3d 1308, 1310 (9th Cir. 1996).

Here, the arbitration agreements between Plaintiffs and the dealerships provide that disputes over the issues of arbitrability, including the interpretation and scope of the arbitration provision, would be submitted to final and binding arbitration. Chart of Arbitration Provisions, Dawson Decl., Ex. A; *see, e.g.*, Laidlaw Purchase Agreement, Dawson Decl., Ex. O ("You agree that any claims arising from or relating to this Lease or related agreements or relationships, including the validity, enforceability, arbitrability or scope of this Provision, at your or our election, are subject to arbitration." (emphasis added)). Therefore, the majority of the arbitration agreements explicitly require the arbitrator to decide the gateway issue of arbitrability.

For the balance of the provisions, established law states that the agreements are sufficient to confer jurisdiction on the arbitrator over questions of arbitrability. In fact, in *Green Tree*, the Supreme Court held that a broadly worded arbitration clause providing that the parties agreed to arbitrate "[a]ll disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract" reflected a "clear and unmistakable" agreement by the parties that an arbitrator should decide questions of arbitrability. *Green Tree*, 539 U.S. at 451-452. Here, all 21 of the arbitration agreements include similar language and are therefore

broad enough to confer jurisdiction on the arbitrator over these threshold issues. Chart of Arbitration Provisions, Dawson Decl., Ex. A.

Finally, the Supreme Court has held that "where there has been delegation of gateway authority to the arbitrator, federal courts may not address a challenge to the validity of the arbitration agreement unless the challenge is specific to the delegation provision itself." *Madgrigal v. AT&T Wireless Servs., Inc.*, No. 1:109-cv-0033-OWW-MJS, 2010 WL 5343299, *4 (E.D. Cal. Dec. 20, 2010) (emphasis added). Therefore, even if Plaintiffs assert that the right to arbitration has been waived or that the arbitration agreements are unconscionable under state law, those issues must be decided by the arbitrator because they do not challenge the validity of the referral provision itself. In fact, many of the Purchase Agreements explicitly state that the arbitrator is to decide questions regarding the "validity" and "enforceability" of the arbitration clause. Chart of Arbitration Provisions, Dawson Decl., Ex. A. Moreover, while courts have held that the courts must decide whether a non-signatory can be forced to arbitrate under an agreement that it did not sign, *e.g.*, *Am. Builders Ass'n v. William Au-Young*, 226 Cal.App.3d 170, 179 (1990), that law is inapplicable here because Toyota is attempting to compel Plaintiffs, who were signatories, to arbitrate pursuant to the terms of their Purchase Agreements.

In sum, the plain terms of the Purchase Agreements dictate that an arbitrator should decide the arbitrability of Plaintiffs' claims. However, even if the Court were to decide this gateway issue, relevant legal authority overwhelmingly supports the conclusion that Toyota can enforce the arbitration agreements.

B. In The Alternative, This Court Should Enforce The Arbitration Agreements And Compel Plaintiffs To Arbitrate Their Claims Against TMC And TMS

Each of the Plaintiffs agreed to an enforceable arbitration agreement that unquestionably covers the claims asserted against Toyota. Although Toyota is not a signatory to those contracts, the doctrine of equitable estoppel prevents Plaintiffs from

relying upon their purchase to sue Toyota while simultaneously denying the applicability of the arbitration agreement they signed in connection with that purchase.

1. Plaintiffs' Claims Fall Within The Scope Of The Arbitration Agreements

The arbitration provisions in Plaintiffs' Purchase Agreements are broad. Chart of Arbitration Provisions, Dawson Decl. at Ex. A (and associated Purchase Agreements). Quite simply, there can be no real dispute as to whether the Plaintiffs' claims "fall within the scope" of their arbitration provisions, thus satisfying the first step of the arbitrability inquiry. Contractual claims for breach of warranty, as well as common law and statutory claims for consumer fraud, are all covered.

For example, Joseph Hauter, a proposed California class representative, signed a Purchase Agreement agreeing to arbitrate "[a]ny claim or dispute, whether in contract, tort, statute or otherwise . . . which arises out of or relates to your . . . purchase or condition of this vehicle . . . ." Dawson Decl., Ex. R (emphasis added). Indeed, each of the 21 Plaintiffs at issue here signed a broad arbitration agreement that covers claims asserted in contract or tort related to the purchase of their Toyota, Lexus, or Scion vehicle(s). Chart of Arbitration Provisions, Dawson Decl., Ex. A; Purchase Agreements, Dawson Decl., Exs. C, E, F, G, H, I, J, L, M, N, O, P, R, S, V, W, X, Y, AA, BB, and CC (all containing similar language).

Given the scope of the arbitration provisions at issue, every single one of the claims asserted by the named class representatives for the proposed bellwether class plainly falls within the scope of arbitration provisions identified in the relevant Purchase Agreements. Chart of Arbitration Provisions, Dawson Decl., Ex. A.

2. This Court Should Compel Arbitration Under The Doctrine Of Equitable Estoppel

a. Equity requires the enforcement of the arbitration agreements at issue

"The legal principle [underlying the theory of equitable estoppel] rests on a simple proposition: it is unfair for a party to rely on a contract when it works to his advantage, and repudiate it when it works to its disadvantage." *Am. Bankers Ins.*

Grp., Inc. v. Long, 453 F.3d 623, 627 (4th Cir. 2006). In other words, equitable estoppel "precludes a party from claiming the benefits of a contract [in suing a third party] while simultaneously attempting to avoid the burdens that the contract imposes." *Comer v. Micor*, 436 F.3d 1098, 1101 (9th Cir. 2006) (quoting *Wash. Mut. Fin. Grp., LLC v. Bailey*, 364 F.3d 260, 267 (5th Cir. 2004)).

District courts in the Ninth Circuit have recognized that equitable estoppel applies to permit a non-signatory to compel arbitration in two distinct circumstances, the first of which applies here:

> First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory. When each of a signatory's claims against a nonsignatory makes reference to or presumes the existence of the written agreement, the signatory's claims arise out of and relate directly to the written agreement, and arbitration is appropriate.

Amisil Holdings, 622 F.Supp.2d at 840 (emphasis added) (concluding that a non-signatory may compel arbitration of a signatory's claims under estoppel principles because the signatory's claims were related to an agreement with an arbitration provision in a way that either refers to or presumes the existence of the agreement) (citing *Hawkins v. KPMG LLP,* 423 F.Supp.2d 1038, 1050 (N.D. Cal. 2006)).

Indeed, numerous federal cases in California have recognized that the doctrine of equitable estoppel allows non-signatories to compel arbitration. *E.g.*, *Mundi v. Union Sec. Life Ins. Co.,* No. CV-F-06-1493 OWW/TAG, 2007 WL 1574871, *3 (E.D. Cal. May 30, 2007) ("When each of a signatory's claims against a non-signatory 'makes reference to' or 'presumes the existence of' the written agreement, the signatory's claims arise out of and relate directly to the written agreement, and arbitration is appropriate." (quoting *MS Dealer Service Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999) (emphasis added))); *see also Amisil Holdings,* 622 F.Supp. 2d at 840; *Hawkins,* 423 F.Supp.2d at 1050. In fact, this Court has held that "[t]here is no good reason to believe the Ninth Circuit would not recognize equitable estoppel as a theory for a non-signatory to compel arbitration in an appropriate case." *Hansen v. KPMG, LLP*, No. CV 04-10525, 2005 WL 6051705, *3 (C.D. Cal. Mar. 29, 2005).

In addition, courts in the Second, Fourth, Fifth, Seventh, and Eleventh Circuits have all recognized that equitable estoppel allows a non-signatory to compel arbitration of a signatory's claims. *See, e.g., Choctaw Generation L.P. v. Am. Home Assurance Co.*, 271 F.3d 403, 406-407 (2d Cir. 2001); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320-21 (4th Cir. 1988); *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000); *Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bldg. Corp.*, 659 F.2d 836, 839-41 (7th Cir. 1981); *MS Dealer*, 177 F.3d at 947-48.

Notably, the broad standards outlined above for applying equitable estoppel were confirmed in a ruling from the Southern District of California less than two months ago. *Robinson v. Isaacs*, No. 11CV1021, 2011 WL 4862420 (S.D. Cal. Oct. 12, 2011). In *Robinson*, the plaintiff sought financial planning advice from a financial planner that worked for two wealth management firms. *Id.* at *1. After an initial meeting, the plaintiff invested over one million dollars pursuant to the recommendations of his financial planner, and he signed contracts with the financial planner and one of his two wealth management firms that contained arbitration clauses. *Id.* When the investments went poorly, the plaintiff sued the advisor and both firms for negligence and breach of fiduciary duty, and all three defendants moved to compel arbitration. *Id.*

As a threshold issue, the Southern District of California had to determine whether the non-signatory wealth management firm could compel the plaintiff to arbitrate under principles of equitable estoppel. *Id.* at *2. Finding it irrelevant that the plaintiff made "no reference to any of the contracts containing arbitration provisions in his complaint," the court focused on the fact that the claims for negligence and breach of fiduciary duty against the wealth management firm were "based on" the underlying "business relationship" reflected in the contracts that contained the arbitration clauses, even though the non-signatory defendant was not a party to those

contracts. *Id.* at *3 (emphasis added). Based on this analysis, the court ruled that "Nexus can compel arbitration despite not being a signatory to the contract." *Id.*

Here, Plaintiffs' claims are all based on alleged duties of Toyota that arose in connection with Plaintiffs' purchases of a Toyota, Lexus, or Scion vehicle. Plaintiffs assert that they were unlawfully induced to sign the contracts at issue, and they seek damages based on the allegedly inflated price reflected in their Purchase Agreements. Moreover, Plaintiffs have sued Toyota for breach of the implied warranty of merchantability, a warranty that is implied by law in the Plaintiffs' Purchase Agreements. In arguing that they overpaid for their vehicles, Plaintiffs assert that they did not receive the "benefit of the bargain" reflected in their Purchase Agreement. *E.g.*, SAMCC, at ¶¶ 461, 2142. Whatever the theory, Plaintiffs' claims all "make reference to" and "presume the existence of" the Purchase Agreements that contain the arbitration provisions. Plaintiffs are therefore estopped from denying the applicability of those arbitration agreements to their claims against Toyota.

b. Automobile manufacturers have routinely invoked equitable estoppel to compel arbitration under purchase agreements signed by dealers and consumers

Federal courts addressing this precise question have held that a non-signatory automobile manufacturer, such as Toyota, is entitled to enforce the arbitration clause in a purchase agreement under principles of equitable estoppel. *Agnew v. Honda Motor Co., Ltd,* No. CV 08-01433 DFH, 2009 WL 1813783, *5 (S.D. Ind. May 20, 2009); *Ford Motor Co. v. Ables,* 207 Fed. App'x 443, 448 (5th Cir. 2006); *Goodwin v. Ford Motor Credit Co.,* 970 F.Supp. 1007, 1018 (M.D. Ala. 1997). In fact, every federal court to address equitable estoppel in the context of consumer claims against an automobile manufacturer has ordered arbitration. *See id.*

In *Agnew,* the plaintiff purported to represent a putative class of Honda vehicle owners, which were advertised and marketed as being "XM Ready." *Agnew,* 2009 WL 1813783, at *1. The plaintiff sued Honda, XM Satellite Radio, and the plaintiff's car dealer, Penske, alleging breach of express and implied

warranties, violation of a state deceptive consumer sales statute, unjust enrichment, fraud, and constructive fraud, in that defendants misrepresented to the class that the vehicles were "XM Ready," when in fact, additional equipment, labor, and expenses were required for the XM radio to operate. *Id.*

The purchase agreement between the plaintiff and Penske included a very broad arbitration clause, but Honda and XM were not parties to the purchase agreement. *Id.* Soon after defendants removed the case to federal court, the plaintiff voluntarily dismissed her claims against Penske. *Id.* at *2. Honda, however, moved to compel arbitration and argued that plaintiff was estopped from denying arbitration of her claims against Honda and XM. *Id.*

After Honda moved to compel arbitration, the plaintiff argued that Honda was not "a party to the contract containing the arbitration clause." *Id.* The court rejected this argument under the principles of equitable estoppel, holding that "any relevant duties that [Honda] had towards [the plaintiff] arose under her contract with [the dealership]." *Id.* at *4. The court also noted that "[t]he claims for breach of express and implied warranties necessarily assume that the warranties were provided as part of the [dealership's] sale to [the plaintiff]." *Id.* In doing so, the court found it irrelevant that the counterparty to the purchase agreement, Penske, was not a party to the lawsuit. *Id.* at *5. In sum, on facts virtually identical to this case, the Court had little difficulty finding that arbitration was required.

c. Plaintiffs' claims all "make reference to" and "presume the existence of" the purchase agreements

The Plaintiffs' claims here all arise out of the fact that every proposed bellwether class representative purchased a Toyota vehicle – or more precisely, executed a Purchase Agreement. Indeed, Plaintiffs' "benefit of the bargain" theory is premised on the very assertion that they did not obtain what was promised in their Purchase Agreements. Simply put, the execution of those agreements is the essential act that gives rise to the claims asserted by the proposed bellwether class.

While Plaintiffs' claims do not literally recite language from the Purchase Agreements as the basis for liability, there is a clear nexus between Plaintiffs' claims and the Purchase Agreements themselves. *See Robinson*, 2011 WL 4862420 at *3 (holding that equitable estoppel applied and finding that it was irrelevant that the plaintiff made "no reference to any of the contracts containing arbitration provisions in his complaint"). For example, Plaintiffs have sued Toyota for breach of the implied warranty of merchantability. *E.g.*, SAMCC at ¶¶ 486, 489, 910-916, 2159-65 (alleging that Toyota breached the implied warranty of merchantability). Under the Uniform Commercial Code, a "warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." *E.g.*, Cal. Com. Code § 2314 (emphasis added). Therefore, the warranties arise from and exist only by virtue of the execution of the Purchase Agreements.

In addition to warranty claims, Plaintiffs have sued Toyota on a myriad of theories alleging consumer fraud. For example, Plaintiffs have alleged that Toyota failed to disclose material information related to sudden unintended acceleration. *E.g.*, SAMCC at ¶ 459, 889, 2130 (alleging failures to disclose material information regarding alleged safety defects under California, Florida, and New York law). Plaintiffs also alleged that Toyota made a series of false, misleading, deceptive, and/or incomplete representations to consumers about the safety of their vehicles. *E.g.*, SAMCC at ¶ 459 (alleging that Toyota made "misrepresentations and omissions regarding the safety and reliability of their vehicles"). Finally, Plaintiffs have alleged that Toyota engaged in deceptive trade practices. *E.g.*, SAMCC at ¶¶ 441-42, 888-95, 2128-36 (alleging fraudulent and unfair business practices in violation of state law).

In each of the consumer fraud claims, Plaintiffs contend that the omission of material information, the fraudulent misrepresentation, and or the deceptive trade practice at issue induced them to purchase their vehicles and to do so at an inflated price that did not account for the alleged defects. *E.g.*, SAMCC at ¶ (alleging under California law that, had Plaintiffs known of the fraud alleged, "they would not have

purchased or leased their Defective Vehicles and/or paid as much for them"); ¶ 936 (alleging under Florida law that Toyota "actively concealed and/or suppressed these material facts, in whole or in part, with the intent to induce Plaintiffs and the Class to purchase Defective Vehicles at a higher price for the vehicles, which did not match the vehicles' true value"); ¶ 2184 (alleging under New York law that, as a result of the fraud alleged, "Toyota charged a higher price for their vehicles than the vehicles' true value and Toyota obtained monies which rightfully belong to Plaintiffs").

Regardless of the specific legal theory, each of Plaintiffs' consumer fraud claims stems from their execution of a Purchase Agreement under allegedly false pretenses. Again, the Purchase Agreements signed by Plaintiffs—which contain the arbitration agreements at issue—embody the very transactions in which they contend they were defrauded by Toyota. Therefore, Plaintiffs consumer fraud claims all "make reference to" and "presume the existence of" the Purchase Agreements. In sum, it would be difficult to overstate the importance of the Purchase Agreements to each and every one of Plaintiffs' claims in the SAMCC. Quite simply, without the execution of the Purchase Agreements, there are no claims, there are no damages, and there is no case. Under established law, the proposed bellwether class representatives cannot base the entirety of the SAMCC on the fact that they purchased Toyota automobiles and "simultaneously . . . avoid the burdens that [the] contract[s] impose[]." *E.g.*, *Comer*, 436 F.3d at 1101.

d. Cases declining to apply equitable estoppel are readily distinguishable

In the few California district court cases that have declined to apply equitable estoppel, the courts have not applied a different standard. Instead, they simply held, under the particular facts of each case, that the claims at issue did not "make reference to" or "presume the existence of" the contract containing the arbitration clause.

For example, in *Chastain v. Union Security Life Insurance Co.,* a consumer sued an insurance company for refusing to pay his credit card payments pursuant to a disability insurance contract, and the insurance company moved to compel arbitration

pursuant to an arbitration provision in the credit card agreement—to which it was not a party—that the plaintiff had previously signed with a separate credit card company. 502 F.Supp.2d 1072, 1073-75 (C.D. Cal. 2007). Although the Court denied the application of equitable estoppel under the intertwined claims theory, it did so because the "duties" that were allegedly breached by the insurance company arose under a separate third-party contract and did not "rely" on the underlying credit card agreement. *Id.*, at 1079. Here, Plaintiffs claims against Toyota are substantially based on duties that arise in tort or by statute in connection with the Purchase Agreements, not under an independently executed contract with a third-party that was a stranger to the underlying transaction. Therefore, *Chastain* is inapposite.

Because California decisions favor the application of equitable estoppel on the facts of this case, Plaintiffs will likely point to isolated cases in other jurisdictions that have applied an erroneous standard under the equitable estoppel doctrine or have misconstrued it altogether. For instance, in *Boyd v. Homes of Legend, Inc.*, a case where equitable estoppel was not applied, the Court held that equitable estoppel could only be applied under the first test if "the duties and responsibilities alleged to have been breached by the nonsignatory [had] arisen under and [had] been assigned to the nonsignatory by the contract containing the arbitration provision." 981 F.Supp. 1423, 1432-33 (M.D. Ala. 1997) (emphasis added).

In doing so, the Court in *Boyd* relied on *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co.*, 741 F.2d 342, 344 (11th Cir. 1984)—a supposedly "paradigmatic example" of an appropriate equitable estoppel case—in which equitable estoppel was applied where a contractor sued a management company for breach of duties imposed by a contract between the contractor and a hospital, the performance of which had been assigned to the management company. *Boyd*, 981 F.Supp. at 1432 (citing *McBro*, 741 F.2d at 344). As the *Boyd* Court observed, the "assignment of duties . . . was the basis for the lawsuit" in *McBro*, and therefore the "claim at issue could not be adjudicated without interpreting and possibly enforcing the terms of the

[underlying] contract." *Id.* Based on *McBro*, the *Boyd* Court held that equitable estoppel would only apply when a lawsuit against a non-signatory is based on the terms of a contract containing an arbitration provision which had been assigned to the non-signatory. *Id.* at 1432-33. That is not and cannot be the law in the Ninth Circuit.

Indeed, *Boyd's* formulation of equitable estoppel renders the entire doctrine pointless. When a contract is formally assigned to a third party, the assignee is contractually entitled to enforce the terms of that contract—including an arbitration clause—as if the assignee was the original party thereto. *Chrysler Fin. Corp. v. Murphy*, No. 97-JEO-2391, 1998 WL 34023394, *3 (N.D. Ala. Aug. 5, 1998) ("It is well-settled that '[a] valid assignment gives the assignee the same rights, benefits, and remedies that the assignor possesses'. . . . includ[ing] entitlement to compel arbitration pursuant to the [assigned contract]." (quoting *Nissan Motor Acceptance Corp. v. Ross,* 703 So.2d 324, 325 (Ala. 1997))). There is no need or basis for the assignee to resort to equity in seeking arbitration when a claim is filed against it for non-performance. For the equitable estoppel doctrine to mean anything, it must apply in a context where a contractual right to arbitration does not already exist. Moreover, if *Boyd* were the law in the Ninth Circuit, every case discussed above would have been decided on different (albeit erroneous) grounds. *See, e.g.*, *Robinson*, 2011 WL 4862420.

Finally, *Boyd* is also distinguishable because there is no indication that the plaintiff sought to rescind the contract or to effectively alter the monetary terms of the purchase agreement as Plaintiffs seek here. *Boyd*, 981 F.Supp. 1423. *Boyd* is therefore deeply flawed and inapposite, and it should not be applied by this Court.

3. The Federal Arbitration Act Requires The Arbitration Agreements to Be Enforced

This Court must compel arbitration unless each Plaintiff proves that their agreement is unenforceable pursuant to a contract defense that applies generally to all contracts. *Concepcion*, 131 S.Ct. at 1745-1746.

*a. State law of unconscionability has a limited role under the FAA post-*Concepcion

The Supreme Court in *Concepcion* instructed that "[the FAA's] saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 1746 (citing 9 U.S.C. § 2). The Supreme Court specifically held that states are barred from imposing their own arbitration-specific rules with respect to agreements governed by the FAA. *Id.* The Supreme Court cited Congress' purpose in enacting the FAA -- to respond to the "widespread judicial hostility to arbitration agreements" and to codify the "liberal federal policy favoring arbitration" -- to support its holding. *Id.* at 1745. Accordingly, there is no question that *Concepcion* has severely curtailed state law unconscionability doctrines to the extent that they are applied to avoid arbitration. *See e.g.*, *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205 (11th Cir. 2011) (recognizing *Concepcion*'s broad impact on state unconscionability analysis); *Estrella*, 2011 WL 2633643 (same).

b. Both substantive and procedural unconscionability are required to invalidate an arbitration clause

In California, Florida, and New York, a finding of unconscionability requires a determination of both procedural and substantive unconscionability, the former focusing on "oppression" or "surprise" due to unequal bargaining power, and the latter on "overly harsh" or "one-sided" results. *Aremendariz v. Found. Health Pyschcare Servs., Inc.*, 24 Cal.4th 83, 114 (2000); *Powertel, Inc. v. Bexley*, 743 So.2d 570, 574 (Fla. Dist. Ct. App. 1999) ("To support a determination of unconscionability…the court must find that the contract is both procedurally unconscionable and substantively unconscionable."); *Gillman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 10 (1988) (holding that a determination of unconscionability requires a "showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." (internal quotation marks omitted)). Where there is only a minimal showing of procedural unconscionability,

Plaintiffs must make a strong showing of substantive unconscionability to render an arbitration clause unconscionable. *Gatton v. T-Mobile USA, Inc.*, 152 Cal.App.4th 571, 585 (2007); *Fonte v. AT&T Wireless Servs., Inc.*, 903 So.2d 1019, 1025 (Fla. Dist. Ct. App. 2005); *Simar Holding Corp. v. GSC*, 87 A.D.3d 688, 690 (N.Y. App. Div. 2011). Neither is present here.

c. The arbitration agreements at issue are not procedurally unconscionable under state law

Under applicable law, procedural unconscionability has two components—oppression and surprise. "Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice . . . . Surprise is defined as the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms." *Gatton*, 152 Cal.App.4th at 581; *Gillman*, 73 N.Y.2d at 10-11 ("The procedural element of unconscionability requires an examination of the contract formation process and the alleged lack of meaningful choice."); *Kohl v. Bay Colony Club Condo., Inc.*, 398 So.2d 865 (Fla. Dist. Ct. App. 1981); *Powertel*, 743 So.2d at 574 (The procedural component "relates to the manner in which the contract was entered and it involves consideration of such issues as the relative bargaining power of the parties and their ability to know and understand the disputed contact terms.").

First, there is no legitimate basis for the Plaintiffs to suggest they were surprised. A party cannot avoid the terms of a contract by claiming surprise on the ground that he or she failed to read it before signing. *Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc.*, 89 Cal.App.4th 1042, 1049 (2001); *Manning v. Interfuture Trading, Inc.*, 578 So.2d 842, 845 (Fla. Dist. Ct. App. 1991); *Brower v. Gateway 2000*, 246 A.D.2d 246, 253 (N.Y.A.D. 1998). Nor is there a requirement to specifically bring an arbitration agreement to the attention of a customer. *Gatton*, 152 Cal.App.4th at 581-582; *Murphy v. Courtesy Ford, L.L.C.*, 944 So.2d 1131, 1135 (Fla. Dist. Ct. App. 2006); *Gillman*, 73 N.Y.2d at 11. Further, the fact that arbitration is a common means of dispute resolution considered within the "reasonable expectations"

of an average customer also weighs against any claims of surprise. *Patterson v. ITT Consumer Fin. Corp.*, 14 Cal.App.4th 1659, 1665 (1993); *O'Dean v. Tropicana Cruises Int'l, Inc.*, No. 98 CIV. 4543(JSR), 1999 WL 335381, *3 (S.D.N.Y. May 25, 1999).

Likewise, the arbitration agreements here were not "oppressive." As an initial matter, the mere fact that an arbitration agreement appears in a contract of adhesion does not make it oppressive. *See Concepcion*, 131 S. Ct. at 1750 (stating that the "times in which consumer contracts were anything other than adhesive are long past"); *Brower*, 246 A.D.2d at 252 (same); *Voicestream Wireless Corp. v. U.S. Comnc'n, Inc.*, 912 So.2d 34, 40 (Fla. Dist. Ct. App. 2005) ("[T]he presence of an adhesion contract alone does not require a finding of procedural unconscionability."). This is especially true here because the sale of a vehicle is not a situation where a weaker party is made an offer and told to "take it or leave it." *Crippen v. Cent. Valley RV Outlet, Inc.*, 124 Cal.App.4th 1159 (2004); *Fonte*, 903 So.2d at 1025 (holding under Florida law that unilateral bargaining power alone does not implicate procedural unconscionability when there are market alternatives); *Tsadilas v. Providian Nat'l Bank*, 13 A.D.3d 190, 191 (N.Y. App. Div. 2004) (holding under New York law that arbitration agreements are enforceable despite an inequality in bargaining power, especially where plaintiff had the opportunity to enter into a similar commercial transaction elsewhere).

Here, the arbitration agreements at issue are clearly delineated in the Purchase Agreements and related documents. Purchase Agreements, Dawson Decl., Exs. C, E, F, G, H, I, J, L, M, N, O, P, R, S, V, W, X, Y, AA, BB, and CC. The arbitration provisions are generally included in the main installment sales contracts or leases signed by the Plaintiffs, and there is no doubt that the Plaintiffs could have purchased vehicles from another dealership. *See Sanchez v. Valencia Holding Co., LLC*, 132 Cal.Rptr. 3d 517, 528 (Cal. Ct. App. 2011) (holding that the existence of market alternatives was irrelevant in that case because "there is no evidence Sanchez could

have purchased a Mercedes–Benz from a dealer who did not mandate arbitration." (emphasis added)). For example, Plaintiff Epps bought a Toyota from a dealership that did not require arbitration in its purchase agreements. Epps Purchase Agreement, Dawson Decl., Ex. D. Therefore, it is beyond dispute that market alternatives existed to avoid arbitration, and the Purchase Agreements for the Plaintiffs are not procedurally unconscionable.

d. The arbitration agreements at issue are not substantively unconscionable under state law

The arbitration agreements signed by the Plaintiffs are also not substantively unconscionable. Substantive unconscionability addresses the fairness of the terms and evaluates whether the terms are "overly harsh" or so one-sided as to "shock the conscience." *Roman v. Superior Ct.*, 172 Cal.App.4th 1462, 1469-1470 (2009); *Powertel*, 743 So.2d at 574 (The substantive component "focuses on the agreement itself" and requires a showing that "the terms of the contract are unreasonable and unfair"); *Gillman*, 73 N.Y.2d at 12 ("The question [of substantive unconscionability] entails an analysis of the substance of the bargain to determine whether the terms were unreasonably favorable to the party against whom unconscionability is urged."). No such conclusion can be reached here. In arguing to the contrary, Plaintiffs may raise the recent decision in *Sanchez*, but any such reliance would be misplaced.

In *Sanchez*, the plaintiff filed a class action against a car dealership operated by defendant, Valencia Holding Co., LLC ("Valencia"), alleging violations of several California laws, including the UCL, CLRA, Song-Beverly Act and a statute covering new tires. Valencia, in response, filed a motion to compel arbitration pursuant to an arbitration provision in the Sale Contract. *Sanchez*, 132 Cal.Rptr. at 523. On appeal, the Court concluded that the arbitration provision as a whole was unconscionable under California law, focusing on four provisions in the arbitration agreement that it found to be substantively unconscionable: (1) an option for either party to appeal an award exceeding $100,000; (2) an option for either party to appeal an award that includes injunctive relief; (3) a requirement that the appealing party advance the fees

and costs for the appeal; and (4) a provision exempting self-help/repossession remedies from arbitration. *Id.* at 529-36.

As an initial matter, even if this Court accepts the conclusion in *Sanchez* on its face (which it should not given the strong admonition of the Supreme Court in *Concepcion* against just such anti-arbitration biases), *Sanchez* does not establish that the arbitration agreements at issue here are unconscionable.[5] As outlined above, Toyota is seeking to compel arbitration against a total of 21 Plaintiffs in the bellwether case. And, of those 21 Plaintiffs, 7 of them signed arbitration provisions that do not contain any of the offending language identified in *Sanchez*. Chart Identifying *Sanchez* Provisions in Arbitration Agreements ("Arbitration Terms Chart"), attached to the Declaration of Cari Dawson as Ex. B. The holding in *Sanchez* is therefore inapplicable to at least these 7 Plaintiffs, as well as any non-California Plaintiffs.

In addition, 7 more Plaintiffs signed arbitration agreements that contained only the provision exempting self-help/repossession remedies from arbitration. Arbitration Terms Chart, Dawson Decl., Ex. B. By itself, this provision alone cannot justify a complete refusal to enforce these 7 arbitration agreements post-*Concepcion*, especially since—as discussed below—the dealerships are already entitled, under black letter law, to exercise self-help remedies without resort to judicial process.

Finally, even with respect to the 7 Plaintiffs that signed arbitration agreements that contained all four of the terms at issue in *Sanchez*, this Court should still compel arbitration because the analysis in *Sanchez* is flawed and should be rejected.

First, the *Sanchez* court's conclusion that the right to appeal arbitration awards exceeding $100,000 would unduly benefit the dealership misses the mark. *Id.* at 529-32. The appeal provision applies mutually to both parties and is inherently balanced. In fact, the Court glosses over the fact that either party can also appeal an award of $0, which is decidedly beneficial to the consumer. In doing so, the Court cites two cases

[5] Notably, *Sanchez* is a single California case, and it has no binding effect in Florida or New York, neither of which have a case reaching a similar result.

that contained appeal provisions containing a substantial monetary threshold, but which did not allow for an appeal of an award of $0. *Id.* (citing *Little v. Auto Stiegler, Inc.*, 29 Cal.4th 1064, 1073 (2003); *Saika v. Gold*, 49 Cal.App.4th 1074, 1079–1080 (1996)). Therefore, the Court's analysis was incomplete and manifestly flawed.

Second, the provision that allowed for the appeal of an award including injunctive relief is also bilateral and balanced. The *Sanchez* court provided no basis for its conclusion that the provision unduly burdens the buyer because the buyer is more likely to seek an injunction than the dealership. This is simply not true. By way of example, the dealership may initiate a replevin action, which is injunctive in nature, to effectuate its right to repossess a vehicle it has sold to a buyer. In any event, the fact that one party is more likely to bring forth a claim under a provision does not make it substantively unconscionable. *In re DIRECTV Early Cancellation Fee Mktg. & Sales Practices Litig.*, No. 09-2093, 2011 WL 4090774, *1 (C.D. Cal. Sept. 6, 2011) (finding that an arbitration clause that allows exemption of claims under the Communications Act of 1934, the Digital Millennium Copyright Act, the Electronic Communications Privacy Act or any other statement of law governing theft of service -- claims more likely to be brought by DIRECTV than plaintiff -- was not unconscionable because both parties theoretically had the right to bring claims).

Third, the *Sanchez* court's reliance on *Gutierrez v. Autowest, Inc.*, 114 Cal.App.4th 77 (2003), a case decided before *Concepcion*, to invalidate the provision that requires an appealing party to advance fees and costs is misplaced. *Sanchez* cites *Gutierrez* for the proposition that "[u]nder the CLRA, a consumer does not have to pay arbitration costs or arbitrator fees (arbitral expenses) that he or she cannot afford or that are prohibitively high." *Sanchez*, 132 Cal.Rptr. at 533. While *Gutierrez* may have previously upheld the CLRA's prohibition on the posting of costs and fees on a consumer, *Concepcion* instructs, in no uncertain terms, that any state law on arbitration that conflicts with the FAA must be displaced. *Concepcion*, 131 S. Ct. at 1746 (citing 9 U.S.C. § 2). Accordingly, *Gutierrez* has been overruled on this point

and is no longer applicable. Moreover, although the court held that a defendant is more likely to utilize the appeal provision, it utterly failed to explain its related holding that the requirement for the appealing party to advance costs for such appeals is also more beneficial to the defendant. *See Sanchez*, 132 Cal.Rptr. at 533-35.

Finally, there is nothing improper with a provision which exempts self-help remedies from arbitration. A secured party's right to self-help remedies, including but not limited to vehicle repossession, is governed by statute and exists independent of any legal proceedings. *E.g.*, Cal. Com. Code § 9609 (A secured party has the right upon default to "[t]ake possession of the collateral . . . [w]ithout judicial process, if it proceeds without breach of the peace" (emphasis added)). Accordingly, because self-help remedies do not require resort to judicial process in the first instance, an arbitration provision that explicitly exempts self-help remedies from arbitration provides a dealership with no additional rights. Instead, the provision simply seeks to avoid an unnecessary argument that self-help rights are subject to arbitration. Therefore, the exclusion of self-help remedies from arbitration is not oppressive.

C. Toyota Has Not Waived Its Right To Compel Arbitration

Waiver of a contractual right to arbitration under the FAA is not favored. *Shinto Shipping Co., Ltd. v. Fibrex & Shipping Co.*, 572 F.2d 1328, 1330 (9th Cir. 1978). Given the federal policy favoring arbitration, Plaintiffs bear a heavy burden in arguing that Toyota waived the right to arbitrate. *Fisher v. A.G. Becker Paribas, Inc.*, 791 F.2d 691, 694 (9th Cir. 1986). In order to establish waiver, Plaintiffs must demonstrate: "(1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." *Id.* Plaintiffs cannot meet this burden here.

1. There Can Be No Waiver As To Absent Putative Class Members

As an initial matter, it is beyond dispute that Toyota did not waive its right to arbitrate with seven of the Plaintiffs at issue because they only became parties to this litigation on or after September 20, 2011 and, prior to that point, they were at most

unnamed putative class members.[6] It is well established in this Circuit and elsewhere that a defendant cannot compel arbitration with a putative class member before a class is certified because they are not parties to the litigation. *E.g.*, *In re: TFT-LCD Antitrust Litig.*, No. 07-1827 SI, 2011 WL 1753784, *4 (N.D. Cal. May 9, 2011) ("It does not appear to the Court that defendants could have moved to compel arbitration against [unnamed class members] prior to the certification of a class in this case because, as defendants point out, 'putative class members are not parties to an action prior to class certification.'" (quoting *Saleh v. Titan Corp.*, 353 F.Supp.2d 1087, 1091 (S.D. Cal. 2004))). Therefore, under established law, Toyota cannot possibly have waived its right to arbitrate against the seven newly-identified Plaintiffs.

2. Toyota Had No Knowledge Of An Existing Right To Compel Arbitration

Toyota did not have an existing right to compel arbitration before the Supreme Court issued its decision in *Concepcion*, and any attempt to compel arbitration would have been futile. In light of this fact, courts in this Circuit that have analyzed waiver under this exact situation, post-*Concepcion*, have consistently found that the right to compel arbitration had not been waived. *See, e.g., Quevedo v. Macy's Inc.*, No. CV 09-1522, 2011 WL 3135052 (C.D. Cal. June 16, 2011) (no waiver of arbitration rights for failing to move for arbitration for over two years after suit was filed); *Villegas v. US Bankcorp*, No. C 10-1762 RS, 2011 WL 2679610 (N.D. Cal. June 20, 2011) (no waiver of arbitration for failing to move for arbitration until 13 months after suit was filed); *In re California Title Ins. Antitrust Litig.*, No. CIV 08-1341-JSW, 2011 WL 2566449 (C.D. Cal. June 27, 2011) (no waiver found). Thus, because Toyota had no right to compel Plaintiffs to arbitrate prior to *Concepcion*, Toyota has not waived its right to compel arbitration of Plaintiffs' claims.

[6] Seven Plaintiffs that signed arbitration agreements became parties to this litigation on or after September 20, 2011: Carol Danziger, Ziva Goldstein, Tom Gudmondson, Linda Savoy, Ada Morales, Charmayne Bennett, and Charles Henry. Bellwether Class Identification [Dkt. 1797] at 12-13, and Ex. B; *Danziger* Am. Compl. ¶¶ 34-41.

3. Toyota Has Not Acted Inconsistently With A Known Existing Right To Compel Arbitration

At the outset of this litigation, Plaintiffs pursued their claims against Toyota exclusively under California law. Toyota reasonably did not believe it had a right to compel arbitration under California law prior to *Concepcion*. Therefore, prior to *Concepcion*, there could not have been any acts by Toyota inconsistent with a known right to arbitrate. Even then, Toyota did not know what law would be applied to this motion until the Court issued its Choice of Law Order on June 8, 2011 [Dkt. 1478].[7] Given this procedural background, it is entirely appropriate and consistent with this Court's scheduling orders for Toyota to file a motion to compel arbitration at this point in the litigation.

4. Plaintiffs Have Not Been Prejudiced

Finally, Plaintiffs have not been prejudiced as a result of any allegedly inconsistent acts by Toyota. As the Ninth Circuit has explained, prejudice is not demonstrated simply because parties have "expended time, money, and effort on responding to pretrial motions and in preparing for trial and conducted extensive discovery of the arbitrable claims." *Fisher*, 791 F.2d at 697; *see also Carcich v. Rederi A/B Nordie*, 389 F.2d 692 (2nd Cir. 1968). Nor is prejudice established by the possibility that there may be some duplication from parallel proceedings. *Fisher*, 791 F.2d. at 698. Here, to the extent any merits discovery has been completed, that work was still necessary because Toyota's motion will not force all named plaintiffs to arbitrate. In sum, there has been absolutely no prejudice to Plaintiffs, and Plaintiffs therefore cannot establish waiver.

V. CONCLUSION

Based on the foregoing points and authorities, Toyota respectfully requests that this Court GRANT Toyota's motion to compel arbitration.

[7] In fact, it was not until an October 11, 2011 scheduling hearing that this Court announced it would be unlikely to apply California law to consumers from other states in the proposed bellwether class [Dkt. 1848 at 35:22-36:5].

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By: /s/
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